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7 JESUS ANDRES LOPEZ,
8 Plaintiff,
9 v.
10 L. MARTINEZ, et al.,
11 Defendants.

Case No. [23-cv-02326-KAW](#) (PR)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; AND DENYING AS
MOOT PLAINTIFF'S MOTION FOR
APPOINTMENT OF COUNSEL**

Re: Dkt. Nos. 12, 20

12 **I. INTRODUCTION**

13 Plaintiff Jesus Andres Lopez, a state prisoner incarcerated at the Correctional Training
14 Facility (“CTF”) in Soledad, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983,
15 alleging that former CTF Warden L. Martinez and former Secretary of the California Department
16 of Corrections and Rehabilitation (“CDCR”) K. Allison violated his constitutional rights by
17 exposing him to Valley Fever.

18 On May 15, 2023, Plaintiff filed his initial complaint, which the court dismissed with leave
19 to amend. Dkts. 1, 5. On January 23, 2024, Plaintiff filed his amended complaint, which is the
20 operative complaint in this matter. Dkt. 7. Plaintiff alleges that he tested positive for Valley
21 Fever for the first time on July 19, 2020. *Id.* at 4.¹ He claims that he was high risk for a serious
22 case of the illness because he has prior medical issues including diabetes, high blood pressure, and
23 high cholesterol. *Id.* He was first made aware of Valley Fever on July 10, 2020, and of the fact
24 that CTF was in a region where Valley Fever could be contracted. *Id.* Around May of 2021,
25 Plaintiff was put on Valley Fever medication, which he has taken for three years. *Id.* at 5. He
26 experiences daily pain because of the disease. *Id.*

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28 ¹ Page number citations refer to those assigned by the court’s electronic case management filing
system and not those assigned by the parties.

1 Plaintiff alleges that defendants were aware of the risk to him and failed to mitigate it or
2 inform him of it upon his arrival at CTF and enable him to take his own precautions. *Id.* He seeks
3 compensatory and punitive damages. *Id.* at 7.

4 This action has been assigned to the undersigned magistrate judge. Pursuant to 28 U.S.C.
5 § 636(c), with written consent of all parties, a magistrate judge may conduct all proceedings in a
6 case, including entry of judgment. Appeal will be directly to the United States Court of Appeals
7 for the Ninth Circuit. *See* 28 U.S.C. § 636(c)(3). The parties have consented to magistrate judge
8 jurisdiction in this matter. Dkt. 3; Dkt. 14.

9 On June 14, 2024, the court found that Plaintiff had addressed the deficiencies identified in
10 its prior order of dismissal with leave to amend. *See* Dkt. 8 at 2-3 (citing Dkt. 5 at 3-5). And the
11 court determined that, liberally construed, Plaintiff stated a claim for relief under the Eighth
12 Amendment against defendants for failing to mitigate and failing to inform Plaintiff of the risk of
13 Valley Fever at CTF. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding prison
14 official is deliberately indifferent if he or she knows that prisoner faces substantial risk of serious
15 harm and disregards that risk by failing to take reasonable steps to abate it)).

16 Before the court is defendants' motion for summary judgment based on Plaintiff's failure
17 to exhaust administrative remedies as to his Eighth Amendment claim in the amended complaint.
18 Dkt. 12. Plaintiff filed an opposition to the motion, and defendants filed a reply. Dkts. 21, 22.
19 Also before the court is Plaintiff's motion for appointment of counsel. Dkt. 20.

20 For the reasons set out below, defendants' motion for summary judgment is GRANTED,
21 and Plaintiff's motion for appointment of counsel is DENIED as moot.

22 **II. MOTION FOR SUMMARY JUDGMENT**

23 **A. Legal Standard**

24 Federal Rule of Civil Procedure 56 provides that a party may move for summary judgment
25 on some or all of the claims or defenses presented in an action. Fed. R. Civ. P. 56(a)(1). "The
26 court shall grant summary judgment if the movant shows that there is no genuine dispute as to any
27 material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see Anderson v.*
28 *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of

1 establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
2 317, 323 (1986); Fed. R. Civ. P. 56(c)(1)(A) (requiring citation to “particular parts of materials in
3 the record”). If the moving party meets this initial burden, the burden then shifts to the non-
4 moving party to present specific facts showing that there is a genuine issue for trial. *See Celotex*,
5 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87
6 (1986).

7 The failure to exhaust administrative remedies is an affirmative defense that must be raised
8 in a motion for summary judgment. *See Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en
9 banc). The defendants have the initial burden to prove “that there was an available administrative
10 remedy, and that the prisoner did not exhaust that available remedy.” *Id.* at 1172. If the
11 defendants carry that burden, “the burden shifts to the prisoner to come forward with evidence
12 showing that there is something in his particular case that made the existing and generally
13 available administrative remedies effectively unavailable to him.” *Id.* The ultimate burden of
14 proof remains with defendants, however. *Id.* “If material facts are disputed, summary judgment
15 should be denied, and the district judge rather than a jury should determine the facts.” *Id.* at 1166.

16 A district court may only consider admissible evidence in ruling on a motion for summary
17 judgment. *See Fed. R. Civ. P. 56(e); Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). In
18 support of the motion for summary judgment, defendants have filed a declaration and exhibits
19 from their attorney, Deputy Attorney General Hannah Park, as well as declarations and exhibits
20 from Associate Director of the Office of Appeals Howard E. Moseley, CTF Grievance
21 Coordinator R. Monroy, and Chief of the Health Care Correspondence and Appeals Branch
22 (“HCCAB”) of the California Correctional Health Care Services (“CCHCS”) S. Gates. *See* Dkt.
23 12-2 – 12-5.

24 As noted, Plaintiff filed his opposition, which is verified as he signed it under penalty of
25 perjury. Dkt. 21 at 6. The amended complaint is also verified, *see* Dkt. 7 at 3, and thus the court
26 will construe it as well as the verified opposition as opposing affidavits under Federal Rule of
27 Civil Procedure 56, insofar as they are based on personal knowledge and set forth specific facts
28 admissible in evidence, *see Schroeder v. McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

1 In addition, the court will consider a declaration of the inmate who assisted Plaintiff in filing the
2 relevant grievance, Anthony A. Sharp, *see id.* at 3, and the February 11, 2022 Institutional Level
3 Response to that grievance, *see id.* at 4-5.

4 **B. Failure to Exhaust Administrative Remedies**

5 **1. Legal Framework for Exhaustion of Available Administrative Remedies**

6 The Prison Litigation Reform Act (“PLRA”) requires a prisoner to exhaust all available
7 administrative remedies before bringing an action with respect to prison conditions. 42 U.S.C.
8 § 1997e(a). “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life,
9 whether they involve general circumstances or particular episodes, and whether they allege
10 excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

11 Exhaustion of all “available” remedies is mandatory; those remedies neither need to meet
12 federal standards, nor must they be “plain, speedy, and effective.” *Booth v. Churner*, 532 U.S.
13 731, 739-40 (2001). The PLRA requires *proper* exhaustion of administrative remedies.
14 *Woodford v. Ngo*, 548 U.S. 81, 83 (2006). “Proper exhaustion demands compliance with an
15 agency’s deadlines and other critical procedural rules because no adjudicative system can function
16 effectively without imposing some orderly structure on the course of its proceedings.” *Id.* at 90-
17 91. Thus, compliance with prison grievance procedures is required by the PLRA to exhaust
18 properly. *Id.*

19 The CDCR provides its inmates the right to administratively grieve and appeal “applied
20 health care policies, decisions, actions, conditions, or omissions that have a material adverse effect
21 on their health or welfare.” Cal. Code Regs. tit. 15, § 3999.226(a) (2018).² For health care
22 matters, inmates must use a form CDCR-602 HC. Cal. Code Regs. tit. 15, § 3999.227. The
23 regulations refer to the first level as a grievance and the second level as an appeal. At the first
24 level, the inmate completes Section A of the form CDCR-602 HC to describe the specific

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27 ² The regulations regarding inmate health care appeals were renumbered, effective August 6, 2018.
28 Former California Code of Regulations Title 15, sections 3087.1 through 3087.12 were
renumbered without substantive change and are now found at sections 3999.226 through 3999.237
of the same title of the California Code of Regulations.

1 complaint that relates to his health and submits the form to the Health Care Grievance Office. *Id.*
2 at § 3999.227(b). If dissatisfied with the institutional level grievance disposition called the
3 “Institutional Level Response,” the inmate may appeal the disposition to the headquarters’ level by
4 completing Section B of the form CDCR 602 HC and submitting the package to the Health Care
5 Correspondence and Appeal Branch in Elk Grove, California. *Id.* at § 3999.229(a). Health care
6 grievances are subject to a headquarters’ disposition before administrative remedies are deemed
7 exhausted. *Id.*

8 An action must be dismissed unless the prisoner exhausted his available administrative
9 remedies *before* he or she filed suit, even if the prisoner fully exhausts while the suit is pending.
10 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). However, where an amended complaint
11 has been filed, a prisoner satisfies the exhaustion requirement as long as he exhausted his
12 administrative remedies *prior to* its filing. *See Rhodes v. Robinson*, 621 F.3d 1002, 1006 (9th Cir.
13 2010) (amended complaint raised new claims which arose after the original complaint was filed);
14 *Cano v. Taylor*, 739 F.3d 1214, 1220-21 (9th Cir. 2014) (amended complaint raised new claims
15 which arose prior to the filing of the initial complaint).

16 In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant
17 may move for dismissal under Federal Rule of Civil Procedure 12(b)(6). *Albino v. Baca*, 747 F.3d
18 1162, 1166 (9th Cir. 2014) (en banc). Otherwise, defendants must produce evidence proving
19 failure to exhaust in a motion for summary judgment under Federal Rule of Civil Procedure 56.
20 *Id.*³

21 **2. Allegations Relating to Exhaustion**

22 **a. Plaintiff’s Version Relating to Relevant Grievance**

23 In his opposition, Plaintiff alleges he exhausted the claims in his amended complaint,
24 stating as follows: “Plaintiff states under oath that Plaintiff did exhaust all of his state remedies

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26 ³ In *Albino*, the Ninth Circuit, sitting en banc, overruled *Wyatt v. Terhune*, 315 F.3d 1108, 1119
27 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the
PLRA, should be raised by a defendant as an unenumerated Rule 12(b) motion. *Albino*, 747 F.3d
at 1166. “[A] failure to exhaust is more appropriately handled under the framework of the existing
rules than under an ‘unenumerated’ (that is, non-existent) rule.” *Id.*

1 including a government claims form which was filed.” Dkt. 21 at 1. He further provided a written
2 declaration from inmate Sharp, who “helped [him] at each level of [his] exhaustion.” *Id.* Inmate
3 Sharp’s declaration states as follows:

4 I declare I am the witness who assisted Plaintiff in filing his 602
5 (grievance) with the prison and I am the one who wrote up all
6 responses in front of Plaintiff at all times including his Gov. claims
form and mailed it for him I am willing to testify to this in court.
All remedies have been exhausted timely.

7 Dkt. 21 at 3.

8 Plaintiff also attaches a relevant health care grievance, log number CTF HC 21000979, in
9 which he sought monetary compensation for contracting Valley Fever in July 2020, which is the
10 claim at issue in his amended complaint. *Compare* Dkt. 21 at 4-5 *with* Dkt. 21 at 4-6. Plaintiff
11 attached CCHCS’s Institutional Level Response dated February 11, 2022 regarding log number
12 CTF HC 21000979, which found that “[n]o intervention” was necessary upon indicating the
13 following basis for that institutional level disposition:

14 Your health care grievance packages and health record, and all
15 pertinent departmental policies and procedures were reviewed. These
records indicate:

16 Per documentation in your medical record, you reported respiratory
17 symptom[s] on July 2020 and were transferred to an outside hospital
18 for further evaluation and treatment if indicated. You were diagnosed
19 with Pneumonia and Coccidioidomycosis⁴ (Cocci). Treatment was
20 initiated and you were returned to CTF on July 25, 2021. Since your
21 diagnosis of Cocci on July 2020 you were issued printed education on
22 cocci infection, causes and treatment. Your primary case provider
23 addressed your diagnosis appropriately and placed orders for ongoing
chronic care appointments, addressed your medication treatment and
made changes due to reported side effects to initial antifungal
medication. Provider has placed orders for ongoing monitor
laboratory tests (cocci titer) and chest x-rays per CCHCS care
guidelines. If you have additional health care needs, you may access
health care services by utilizing the approved processes in accordance
with [CCHCS] policy.

24 Dkt. 21 at 4-5. In addition, the response outlined the proper next steps to appeal the grievance,
25 stating:

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⁴ Coccidioidomycosis or “Cocci” is another name for Valley Fever. *See*
28 <https://www.ncbi.nlm.nih.gov/books/NBK448161/#article-19667.s2> (last visited Mar. 24, 2025).

1 If you are dissatisfied with the Institutional Level Response, follow
2 the instructions on the CDCR 602 HC, Health Care Grievance, and
3 submit the entire health care grievance package for headquarters'
4 level review. The headquarters' level review constitutes the final
5 disposition on your health care grievance and exhausts your
6 administrative remedies

7 *Id.*

8 The court notes that in Plaintiff's opposition, he fails to include a copy of the possible
9 headquarters' level response to the relevant health care grievance, log number CTF HC 21000979,
10 or any additional evidence that he submitted the grievance to the headquarters' level.

11 **b. Defendants' Version Relating to Relevant Grievance**

12 In their reply to Plaintiff's opposition, defendants conceded that that the health care
13 grievance submitted by Plaintiff, log number CTF HC 21000979, sufficiently pertained to his
14 deliberate indifference claim against defendants.⁵ Dkt. 22 at 2. However, in support of
15 defendants' argument that Plaintiff's Eighth Amendment claim is unexhausted, defendants submit
16 evidence log number CTF HC 21000979 was not submitted to the headquarters' level for further
17 review. *See id.* (citing Dkt. 2-5 at 5).

18 According to Chief Gates, HCCAB is the section of the CCHCS that provides oversight of
19 medical, dental, and mental health care appeals/grievances for adult inmates in the CDCR. Gates
20 Decl. ¶ 1. As HCCAB Chief, he oversees staff who "receives, reviews, and maintains all health
21 care appeals/grievances accepted for the final (headquarters) level of review in the inmate health
22 care appeal/grievance process, and renders decisions on such appeals/grievances. *Id.* at ¶¶ 2-3.
23 All levels of health care appeals/grievances, including institutional and headquarters level of
24 review, are tracked through a computer database known as the Health Care Appeals and Risk
25 Tracking System ("HCARTS"). *Id.* at ¶ 4. This system tracks "health care appeals that were
26 received and ultimately rejected and the reason for the rejection." *Id.* The HCARTS is kept as a
27 regularly conducted activity, and the computer entries are made at or near the time of the
28 occurrence by the employee who processes the health care appeal/grievance. *Id.* Chief Gates

27 ⁵ Initially, when defendants filed their motion to dismiss, they claimed that plaintiff failed to
28 submit *any* grievance concerning the Eighth Amendment claim at issue. *See* Dkt. 12-1 at 3-4.
 However, defendants have since withdrawn their prior assertion after plaintiff submitted the
 aforementioned relevant health care grievance, log number CTF HC 21000979. *See* Dkt. 22 at 2.

1 states that a review of the inmate health care appeal/grievance history records in the HCARTS
2 database was conducted for Plaintiff and attached to Chief Gates's declaration is a copy of the
3 HCARTS health care appeal/grievance history printout for Plaintiff. *Id.* at ¶ 8, Ex. A (Dkt. 12-5
4 at 4-12). Chief Gates certifies that the aforementioned printout is a correct copy of the original
5 document. *See id.* In the printout, log number CTF HC 21000979 indicates that its "Grievance
6 Level" was "Institutional," and its "Grievance Status" is marked as "Closed." Dkt. 12-5 at 5. The
7 "Date Closed" for log number CTF HC 21000979 at the "Institutional Level" is "2/11/2022" with
8 the "Disposition" of "No Intervention." *Id.* Nothing in the printout indicates that log number CTF
9 HC 21000979 was further appealed to the headquarters' level. *Id.*

10 **3. Analysis Relating to Exhaustion**

11 A California prisoner is required to submit an inmate appeal at the appropriate level and
12 proceed to the highest level of review available to him. *Butler v. Adams*, 397 F.3d 1181, 1183 (9th
13 Cir. 2005); *Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002). Further, as mentioned above,
14 health care grievances are subject to a headquarters' disposition before administrative remedies are
15 deemed exhausted. *See* Cal. Code Regs. tit. 15, 3999.226(g).

16 While log number CTF HC 21000979 may support Plaintiff's assertion that he initiated the
17 grievance process as to his Eighth Amendment claim at issue, defendants argue that such evidence
18 "does not save [Plaintiff's] claim from dismissal because the undisputed evidence shows that [he]
19 did not pursue this grievance to the highest level of appeal [the headquarters' level], and thus
20 failed to properly exhaust his administrative remedies." Dkt. 22 at 2. Defendants point out that
21 there is no evidence to suggest that Plaintiff complied with the instructions given in the
22 Institutional Level Response, which informed him that he may submit his grievance for
23 headquarters' level review and explained the steps he needed to take to exhaust his administrative
24 remedies. *Id.* (citing Dkt. 21 at 5).

25 The court has reviewed log number CTF HC 21000979 as well as Plaintiff's health care
26 appeals/grievance history, and it agrees with defendants' assessment that Plaintiff failed to pursue
27 log number CTF HC 21000979 to the highest level of review (the headquarters' level). *See id.* A
28 grievant must utilize all steps of the grievance process made available by the prison so that it can

1 reach the merits of the complaint. *Woodford*, 548 U.S. at 90.

2 Defendants have met their initial burden as the moving party by setting forth evidence to
3 demonstrate Plaintiff's non-exhaustion, specifically by conducting a search of the CDCR's records
4 and finding that log number CTF HC 21000979 was never submitted to the headquarters' level by
5 Plaintiff. *See Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). Defendants, relying on
6 declarations of HCCAB Chief Gates, argue that log number CTF HC 21000979 was not exhausted
7 to the highest level of review. *Id.* (citing Dkt. 21 at 5). Under *Albino*, defendants have therefore
8 proven that there was an available administrative remedy, and that Plaintiff did not exhaust that
9 available remedy. *See Paramo*, 775 F.3d at 1191.

10 Upon the burden shifting to Plaintiff, he has failed to show that "there is something
11 particular in his case that made the existing and generally available administrative remedies
12 effectively unavailable to him by 'showing that the local remedies were ineffective, unobtainable,
13 unduly prolonged, inadequate, or obviously futile.'" *Id.* As mentioned above, Plaintiff merely
14 relies on the "Institutional Level Response" for log number CTF HC 21000979 as proof of
15 exhaustion, but his reliance is unwarranted because it fails to show that log number CTF HC
16 21000979 was submitted to the *highest* level of review (headquarters' level). *See* Dkt. 21 at 4-5.
17 Further, Plaintiff's CCHCS appeals/grievance history indicates he sent one of his health care
18 grievances, log number CTF HC 18001272, to the headquarters' level on November 19, 2018,
19 which suggests that *prior to* the relevant time frame—in July of 2020 when he contracted Valley
20 Fever—he was aware of and understood the requirement to pursue his health care grievances up to
21 the headquarters' level. *See* Dkt. 21-5 at 6. Furthermore, the record shows that the Institutional
22 Level Response to log number CTF HC 21000979 informed Plaintiff that he could submit the
23 grievance to headquarters' level review and explained the specific steps to exhaust his
24 administrative remedies. *See* Dkt. 21 at 5. However, Plaintiff has failed to provide any evidence
25 to show that he complied with these steps to pursue log number CTF HC 21000979 to the
26 headquarters' level. Thus, the evidence presented by Plaintiff is insufficient to defeat defendants'
27 motion for summary judgment. Meanwhile, the evidence produced by the defendants *is sufficient*
28 to carry their ultimate burden of proof in light of Plaintiff's verified factual allegations.

1 The record in this case demonstrates that Plaintiff had the opportunity and ability to
2 properly exhaust his Eighth Amendment claim but failed to do so. Accordingly, the court
3 GRANTS defendants' motion for summary judgment as to the Eighth Amendment claim against
4 defendants, which is subject to dismissal without prejudice. *See McKinney v. Carey*, 311 F.3d
5 1198, 1200-01 (9th Cir. 2002) (proper course in claims dismissed due to failure to exhaust
6 administrative remedies is dismissal without prejudice to refiling).

7 **III. CONCLUSION**

8 For the reasons outlined above, the court orders as follows:

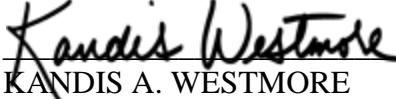
9 1. Defendants' motion for summary judgment is GRANTED. Dkt. 12. The Eighth
10 Amendment claim in the amended complaint is DISMISSED without prejudice to refiling after
11 exhausting California's prison administrative process. *See McKinney*, 311 F.3d at 1200-01.

12 2. The Clerk of the Court shall close the file and terminate all pending motions as
13 moot, including Plaintiff's motion for appointment of counsel. Dkt. 20.

14 3. This Order terminates Docket Nos. 12 and 20.

15 **IT IS SO ORDERED.**

16 Dated: March 28, 2025

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18 KANDIS A. WESTMORE
19 United States Magistrate Judge

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